85-531

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE CITY OF LOS ANGELES, a Municipal Corporation, TOM BRADLEY, DARYL GATES, JAMES FISK, SAMUEL WILLIAMS, MARIANA PFAELZER, STEPHEN REINHARDT, SALVATORE MONTENEGRO, RIVA TOLLEY, and STEPHEN YSLAS,

Petitioners,

vs.

RONALD HELLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES K. HAHN, City Attorney
JOHN T. NEVILLE
Senior Assistant City Attorney
KATHERINE J. HAMILTON
Deputy City Attorney
1700 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-7400

Attorneys for Petitioners

90 pp

QUESTIONS PRESENTED

1. Whether a plaintiff in a bifurcated 42 U.S.C. section 1983 civil rights suit is entitled to proceed to trial against a municipal entity where the sole basis of his suit is that he was injured by a policy, custom or usage of the public entity which violated his constitutional rights, and the jury, which was not instructed on the applicability of any immunity or defense, has already returned a verdict in favor of the entity's police officer who had allegedly caused the injury.

2. Whether summary judgments in favor of individual municipal defendants in a 42 U.S.C. section 1983 civil rights suit may be reversed when the appellant's notice of appeal does not reference the judgment, his designation of record does not include any documents relevant to the judgments, his briefs fail to challenge the judgments and the judgments were not the subject of oral argument in the reviewing court.

PARTIES IN THE COURT BELOW

Ronald Heller was the plaintiff-appellant in the court below. The City of Los Angeles, a Municipal Corporation, was a defendant-appellee in the court below. James Fisk, Samuel Williams, Mariana Pfaelzer, Stephen Reinhardt, Salvatore Montengro, Riva Tooley and Stephen Yslas were defendants in the trial court below who were named in their individual capacities as members of the Los Angeles Board of Police Commissioners. Tom Bradley and Daryl Gates were defendants in the trial court who were dismissed on motion for summary judgment from this action.

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No. _____

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THE CITY OF LOS ANGELES, a Municipal Corporation, TOM BRADLEY, DARYL GATES, JAMES FISK, SAMUEL WILLIAMS, MARIANA PFAELZER, STEPHEN REINHARDT, SALVATORE MONTENEGRO, RIVA TOLLEY, and STEPHEN YSLAS,

Petitioners,

vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, City of Los Angeles, et al., respectfully pray that a writ of certiorari issue to

review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on May 1, 1985.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Ciruit, reversing the district court's order dismissing municipal defendants after a jury had returned a verdict in favor of a public employee in a bifurcated civil rights suit brought pursuant to 42 U.S.C. section 1983 on the ground that the plaintiff was entitled to proceed with his suit against the municipal entity, is reported at 759 F.2d 1371 (9th Cir. 1985) and is attached hereto as Appendix A.

JURISDICTION

Petitioners were appellees in this case in the United States Court of Appeals for the Ninth Circuit below. The original opinion and judgment was filed on May 1, 1985. Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on May 13, 1985 which was denied without opinion on June 27, 1985. (Appendix B.) This petition is timely filed within 90 days of that date. (28 U.S.C. §2102(c), Rule 20.4, Rules of the United States Supreme Court.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1983 of 42 U.S.C. provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent filed his complaint in this matter on June 19, 1980. (Clerk's Docket (hereinafter C.D.) 1.) Motions to dismiss the complaint on behalf of all defendants were granted and respondent was given leave to amend the compliant. (C.D. 26, 27.) Respondent's first amended complaint was thereafter filed on November 5, 1980, naming as defendants Los Angeles Police Officers Bushey and Brasher, Los Angeles Police Chief Daryl Gates, Los Angeles Mayor Tom Bradley, the City of Los Angeles, and individual members of the Los Angeles

Board of Police Commissioners. (C.D. 28, Exerpt of Record 1.) An answer on behalf of the two police officers was filed on November 25, 1980 (C.D. 30) and, after denial of a motion to dismiss (C.D. 31, 46), an answer on behalf of the remaining defendants was filed on February 24, 1981. (C.D. 49.)

Pre-trial motions resulted in the elimination of several defendants and causes of action from the lawsuit. Summary judgment was granted as to Officer Brasher, and granted in part and denied in part as to Officer Bushey, and denied as to the other defendants. (C.D. 102.) After this summary judgment, the only remaining claims against Officer Bushey were contained in respondent's cause of

action alleging a violation of Section 1983 of the Civil Rights Act, 42 U.S.C. §1981, et seq. (C.D. 142.) In a separate action on September 21, 1981, the trial court on its own motion dismissed the complaint as to individually named members of the Los Angeles Board of Police Commissioners and substituted in their stead the Board of Police Commissioners. (C.D. 143, Exerpt of Record 11.) At a later date, Police Chief Daryl Gates and Mayor Tom Bradley were also eliminated from the lawsuit by the grant of a summary judgment motion. (C.D. 147.)

On October 18, 1982, respondent's motion for summary judgment on the issue of the existence of a policy encouraging the use of excessive force

was heard and denied. (C.D. 203.) Additional counts of the complaint were also dismissed. (C.D. 203.) The trial court's decision to bifurcate the trial was also apparently made at the October 18, 1982 conference which was held in chambers, and respondent's opposition to the bifurcation is noted in the minute order. (C.D. 203.)

Jury trial commenced on October 19, 1982. (C.D. 211.) Respondent testified that on June 10, 1980 at approximately 10:00 p.m. he was driving his vehicle in the Venice area of the City of Los Angeles when he was pulled over by two motorcycle police officers. (Reporter's Transcript of October 19, 1982 (hereinafter I RT) 12-13.) Mr. Heller asserted that he

cooperated with the police, supplying his driver's license and stepping out of the car when requested. (I RT 13-14.) Mr. Heller testified that he was moved by the officer around the corner from where he stopped his car, and that he complied with the officer's request and performed several field sobriety tests which he passed. (I RT 15-19.) When the officer nevertheless indicated that he was under arrest, respondent started yelling for his friends who were passengers in his car. (I RT 20.) At that point, the officer placed his hands on Mr. Heller's chest and pushed him through a plate glass window. (I RT 20-22.) Respondent testified that his hands and arms were cut by the

glass and that he received medical treatment at the scene of the incident and later visitied a doctor for further treatment. (I RT 27-28, 34-36.) Mr. Heller was then taken to the police station where he took a breath test and was charged with resisting arrest, but he testified that he was never prosecuted for this offense or for any other. (I RT 29-33.) Respondent admitted on cross-examination that he had had one or two glasses of wine to drink approximately one-half hour before this incident (I RT 43).

Los Angeles Police Officer Craig Bushey testified that he had stopped respondent because respondent's car was observed exceeding the speed limit

and weaving between the lanes, at times crossing over the double-yellow line on the road. (Reporter's Transcript of October 20, 1982 (hereinafter II RT) 108-109.) Officer Bushey approached respondent's car, noticed that respondent's eyes were bloodshot and that there was an odor of alcoholic beverage on his breath, and asked him to get out of the car to perform field sobriety tests. (II RT 100.) Officer Bushey administered the tests and concluded that respondent was under the influence of an alcoholic beverage and should be taken to the police station for further chemical tests. (II RT 111-120.)

Officer Bushey instructed Mr. Heller to place his hands behind his

back. Mr. Heller did not comply with this order, however, and placed his hands on his head. The officer grabbed respondent's left hand and attempted to put it behind respondent's back, and a tug-of-war ensued while the officer attempted to handcuff respondent. After two or three attempts to handcuff respondent, he was able to break away and took several quick steps away from the officer. (II RT 90-95.)

Officer Bushey testified that respondent was yelling for help as he walked quickly away towards his own car, and that he grabbed respondent from behind around the neck and attempted to apply a modified carotid hold to control respondent. (II RT

95-98.) Officer Bushey was never able to complete the hold on respondent, however, as the struggle caused the two to spin around into the plate glass window next to the sidewalk and they both went through the window. (II RT 90-101.) Officer Bushey cut his arm and hand on the fall through the window, and he denied pushing respondent through the window. (II RT 122-128.) Officer Bushey admitted that Mr. Heller had taken a breath test and the results of the test indicated that repondent's blood alcohol content was .02 and .01 percent, a level below .10 percent at which any person is presumed to be under the influence of alcohol. (II RT 134-135.)

As part of his case in chief, respondent called James J. Fyfe as an expert on police and criminal justice systems and on the use of deadly force. (II RT 149-151.) Mr. Fyfe described the standards utilized by the Los Angeles Police Department with regard to escalating force and opined that Officer Bushey in this case had used excessive force in making the arrest. (II RT [illegible]-160.) In Mr. Fyfe's opinion, the use of a carotid hold was inappropriate. (II RT 162.) While admitting that a police officer was permitted by California law to utilize reasonable force to effect an arrest, and that the conduct of the police officer in this case followed the policy of escalating force (II RT

164-174), Mr. Fyfe insisted that the Los Angeles Police Department was the only police force in the country where a carotid hold was considered to be a proper step in escalating force short of deadly force.

Officer Bushey's supervisor, Dwayne Shrader, described the Los Angeles Police Department's policy of escalating force as moving from verbal command through physical force, pain compliance and finally a control hold such as the carotid. (Reporter's Transcript of October 21, 1982 (hereinafter III RT) 274-280.) Given the circumstances of this case, Sergeant Shrader was of the opinion that Office Bushey had complied with the policy by attempting to control

respondent with verbal orders, then by attempting to force respondent to place his hands behind his back, and then, when respondent broke away, by attempting to apply a control hold. (III RT 281.)

After both sides rested, a conference in chambers was held with regard to proposed jury instructions. (Reporter's Transcript of October 22, 1982 (hereinafter IV RT) 635.) Respondent made several objections with regard to language in the instructions relating to the reasonableness of the officer's conduct. Arguing that such language implicated the issue of a good faith defense, respondent convinced the trial court to delete all such

references. (IV RT 639-640, 646, 650-651.) No argument was made by petitioners with regard to a good faith immunity for any constitutional violation which occurred (IV RT 696-718), and no instructions were given to the jury on the subject of a good faitn defense. (Reporter's Transcript of October 25, and 26, 1982 (hereinafter V RT) 803-822.)

Discussion on the record regarding the jury instructions makes it clear that all parties believed and concurred in the proposition that the question of whether or not the police officer had acted in good faith had been and was to be removed from the case. (IV RT 639:10 to 640:5; 650:17 to 651:6; 651:15 to 653:12;

653:16-19.) The jury was instructed that individuals have a right not to be subjected to excessive force while being arrested (V RT 812:10 to 813:2), that they were to examine the evidence to determine whether the police officer committed the acts alleged and, if so, whether the officer was acting within or without the bounds of his lawful authority. (V RT 813:22 to 814:8.) Jurors were instructed that the officer could not have deprived the respondent of any right without due process of law so long as he acted within the limits of his lawful authority and, "in that regard", were further instructed regarding the circumstances when a police officer may properly arrest. (V RT 814:11 to

815:5.) No instructions were proffered informing the jury that a police officer, acting within departmental policy in using physical force to make an arrest, would be acting within the limits of his lawful authority. No instruction was given that the police officer would be immune from liability if he acted in good faith reliance on the propriety of his department's policy.

The jury was further instructed that an arrestee has the constitutional right not to be subjected to unreasonable or excessive force while being arrested, that an officer can use such force as is necessary under the circumstances to effect the arrest, and that whether

the force used was excessive or unreasonable is to be determined in light of all the surrounding circumstances. (V RT 815:6 to 816:1.) Finally, the trial court stated:

> "Now, in summary, if you find . . . that the plaintiff has proved his claim that he was arrested without due process of law or that he was subjected to an excessive force in being placed under arrest, your verdict will be for the plaintiff and against the defendant. On the other hand, if you find that the plaintiff has not proved . . . any of his claims of

constitutional deprivation, then, of course, your verdict would be for the defendant and against the plaintiff."

(V RT 816:2-12.)

When the jury returned a unanimous verdict in favor of Officer Bushey, no poll was requested by respondent. (V RT 833-834.) Outside the presence of the jury, respondent then argued to the court that the case was not completed and that he should be permitted to proceed with regard to the existence of a policy of the City of Los Angeles under which constitutional rights could be violated. (V RT 834-835.) Respondent asserted that the jury had not found that his rights were not violated, and

may have found that the officer was simply acting within departmental policy. If the policy was unconstitutional, respondent asserted, then the officer may not be liable but the city could still be found so. (V RT 836.) The trial court noted that no instructions had been given to the jury with regard to the officer's possible reliance on departmental policy or a good faith defense (V RT 843) and therefore found that the question of the existence of a policy and concommitant municipal liability was moot and dismissed the action as to the remaining defendants. (V RT 844).

Respondent appealed the judgment dismissing the City of Los Angeles and

the Board of Police Commissioners from the lawsuit but did not challenge the judgment in favor of Officer Bushey. Respondent also failed to mention in his notice of appeal the October 6, 1981 order (C.D. 147), which was subsumed in the final judgment, granting summary judgment as to Tom Bradley and Daryl Gates. After briefing and oral argument, the United States Court of Appeals for the Ninth Circuit filed its opinion on May 1, 1985 reversing the order of dismissal on the ground that the judgment in favor of Officer Bushey did not preclude the claims against the Police Commission or the City. (Appendix A-3 to A-4.) The Court of Appeals' opinion cites no error on the part of

the trial court in instructing the jury and also fails to comment on the trial court's bifurcation of the causes of action against the individual police officer and the City and commissioners. The Court admitted that the jury's verdict proved that the respondent had been arrested for reasonable cause and that the amount of force used by the officer was not unreasonable or excessive. (Appendix A-11 to A-12.) The Court then asserted that the jury's conclusion could have been based either on the officer's behavior in conformance with the Police Department policy on escalating force, or on a constitutional standard independent of the policy. (Appendix A-12.) The

Court concluded that since the question of whether application of force in accordance with the policy exceeded constitutional limits had not been determined, the verdict in favor of the officer was therefore inconclusive. (Appendix A-15.)

In the second portion of its opinion, the Court of Appeals held that the grant of summary judgment in favor of Tom Bradley and Daryl Gates was erroneous and, further, that the dismissal of individual police commissioners in favor of substituting the Board of Police Commissioners was incorrect. (Appendix A-19 to A-20.) The Court asserted that the record in this matter failed to reveal which individual defendants adopted a plan

or policy authorizing or approving the alleged unconstitutional conduct. Accordingly, the Court concluded, the record did not disclose a proper basis for dismissal of individual defendants on summary judgment. (Appendix A-20 to A-21).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTON IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A.

The Court's decision is based on the conclusion that the

jury failed to follow its instructions.

As this Court has repeatedly ruled, a reviewing court must begin an analysis of the effect of jury instructions on the jury from the assumption that the jury followed the court's instructions. (Aspen Skiing Co. v. Aspen Highlands Skiing Corp., ___ U.S. ___, 105 S.Ct. 2847, 2858 (1985).) Appellate courts should be slow to impute to juries disregard of their duties, including the duty to follow the court's instructions. (Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485, 53 S.Ct. 252, 77 L.Ed. 439, 445 (1932).) The Court of Appeals in this matter, however, has ignored this admonition

and instead has speculated freely on what improper uses the jury might have made of evidence presented in the case.

The Court of Appeals' opinion fails to cite any instructional error by the trial court and ignores the simple fact that the jury was not instructed to determine whether force consistent with the department's escalating force policy would violate an arrestee's rights. Rather, the instructions merely asked the jury to determine whether respondent was arrested without due process of law or subjected to excessive force. (V RT 816:2-12.) By speculating that the jurors could have considered the police officer's compliance with the escalating force policy to be an

indication of reasonableness or the assertion of a good faith immunity (Appendix A-12), the Court below has improperly assumed that the jury could have decided the case on issues of law not presented to them. Without a citation to some error by the trial court in instructing the jury, however, the record in this matter presents no ground for the Court of Appeals' departure from the traditional assumption that a jury follows its instructions correctly. (Pittman v. Littlefield, 438 F.2d 659, 662 (1st Cir. 1971).)

By ruling that the jury in this case could have decided this matter in favor of the police officer by reliance on legal principles on which

they were not instructed the Court of Appeals has impliedly decided an important question of federal law in a way in conflict with decisions of this Court presuming that a jury follows its instructions. The implication of the Court of Appeals' opinion is that it is virtually impossible to bifurcate the "constitutional injury" component of a 42 U.S.C. section 1983 suit from the "Monell claim." (Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 98 S.Ct. 2018 (1978).) If any testimony regarding the officer's conformance with applicable laws governing conduct or departmental regulations or policies controlling the officer's actions is admitted, the jury will be

"contaminated" by such evidence and could conclude, in spite of the fact that they received no instructions on the subject, that the officer's conduct was excused. By ignoring applicable decisional law presuming jurors follow their instructions and failing to cite any instructional error by the trial court in this matter, the Court of Appeals has called into question virtually all section 1983 suits wherein no evidence of good faith immunity or possible excuse is proffered but where testimony is nonetheless admitted concerning standards of conduct to which the police officer is required to conform. This Court should therefore grant the within Petition to

establish the applicability of accepted principles of law concerning presumptions of regularity of jury instructions to lawsuits such as the case at bar.

B.

The Court's opinion suggests that a lawsuit brought pursuant to 42 U.S.C. section 1983 may be maintained against a public entity on a respondeat superior theory.

This Court has ruled that a municipality may be found liable under 42 U.S.C. section 1983 if a plaintiff can prove that

". . . the action that is alleged to be unconstitutional implements

> or excuses a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (Monell v. Dept. of Soc. Serv. of City of N.Y., supra at 436 U.S. 690, 98 S.Ct. 2035-2036.)

Municipalities may not be held liable under a respondeat superior theory for the isolated torts of their employees, but only when ". . . -action pursuant to official policy of some nature cause[s] a constitutional tort." (Id. at 436 U.S. 691, 98 S.Ct. 2036.)

The Court of Appeals below admitted that the jury in this case found that respondent had been

arrested for reasonable cause and that the amount of force used by the police officer was not unreasonable or excessive. (Appendix A-11 to A-12.) The Court then found fault with the evidence upon which the jury might have relied in making this finding. (Appendix A-12.) By thus shifting the focus away from what the jury in fact found, the Court ignored the obvious question which the holding below raises: How can an arrest based on reasonable cause, made with force found to be reasonable and not excessive, serve as a basis for an award of damages against the arresting officer's employer?

Logically, force applied in making an arrest is either excessive or not,

and the amount of force used must comply with some objective standard in order to fall on one side or the other of this disctinction. The jury in this matter was asked to examine the amount of force used and to objectively determine whether it was so excessive as to deprive respondent of his right to due process of law. They were not instructed that the amount of force used could be excessive and the officer still entitled to a verdict in his favor, and nothing in the record supports such a presumption. There is simply no way an arrestee could be subjected to excessive force and not suffer a deprivation of his constitutional right to due process. Therefore, a

finding that no excessive force was applied necessarily implies that no deprivation of constitutional rights occurred.

This Court made it clear in Monell that the basis of liability for a municipality or its officials is the factual nexus between a policy, custom or usage of the municipality and an injury of constitutional dimension to the plaintiff. (Monell v. Dept. of Soc. Serv. of City of N.Y., supra.) The Court of Appeals has cited no authority which could support the imposition of liability on a municipality where a jury has conclusively found no injury. The Court of Appeals' opinion does violence to the rule of Monell in that

it appears to permit the maintenance of a civil rights suit against a municipal defendant where no injury has been found or can be proved. Since the only basis in this case for the imposition of liability on the City of Los Angeles under 42 U.S.C. section 1983 was the allegation that respondent was subjected to excessive force when arrested, and the jury found (as the Court of Appeals admitted) that the force used was not excessive, then no Monell issue remained to be tried and the Court of Appeals' reversal of the trial court's dismissal order is not only erroneous but misapplies the rule of Monell. This Court should therefore grant the within Petition to clarify the

inapplicability of Monell to cases where no injury of constitutional dimension has been proven.

II.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER.

In addition to ruling that the respondent was entitled to proceed against the City of Los Angeles even after the jury had found in favor of Officer Bushey, the Court of Appeals below also ruled that the trial court erred in dismissing the individually named defendants. These defendants included the Chief of Police, Daryl

Gates, and the Mayor of Los Angeles, Tom Bradley, who were dismissed on petitioners' motion for summary judgment, as well as individual members of the Board of Police Commissioners who were dismissed by another division of the district court at another proceeding. While respondent had cited the dismissal of the individual police commissioners as error in his notice of appeal, and raised the issue in his opening brief, no mention was made of the order granting summary judgment in favor of Gates and Bradley in the notice or the briefs.

Rule 3(c), Federal Rules of Appellate Procedure, requires that a notice of appeal designate the

judgment, order or part thereof appealed from. This rule has been interpreted by the United States Court of Appeals for the Third Circuit to limit an appellate court's jurisdiction to only that judgment or portion of the judgment specified in the notice or ". . . fairly to be inferred from the notice as intended to be presented for review on the appeal." (Elfman Motors, Inc. v. Chrysler Corp., 567 F.2d 1252, 1254 (3rd Cir. 1977).) Thus, where a case involves multiple defendants, and summary judgment is entered in favor of some but not all of the defendants, and the notice of appeal after jury verdict and post-trial motions fails to cite the summary judgment order, a

motion to dismiss the appeal by the defendants for whom summary judgment had been granted must be granted. (Id. at 567 F.2d 1253.)

The United States Court of Appeals for the Fourth Circuit has also ruled on this question in a manner similar to the Third Circuit. In Gunther v. E.I. Du Point De Nemours & Co., 255 F.2d 710 (4th Cir. 1958), the notice of appeal filed from three judgments entered in the case failed to reference a summary judgment entered in favor of a particular defendant. (Id. at 255 F.2d 717.) The reviewing court found that the notice of appeal was insufficient since it failed to acquaint the appellee or the appellate court with the fact that an appeal had

been taken from a specific judgment in a particular case. (Ibid.) While an appeal will not be dismissed for mistakes which do not mislead or prejudice the appellee, the jurisdiction of an appellate court is nevertheless determined by the specific terms of the notice of appeal which can not be modified to cover a judgment not included in the notice by any reasonable interpretation. (Ibid.)

In Ruckman and Hansen, Inc. v. Contracting & Material Co., Inc., 326 F.2d 722 (7th Cir. 1964), this same rule was also applied by the United States Court of Appeals for the Seventh Circuit. The judgment in the trial court had been entered in three parts, and the appellant's notice of

appeal specified only one part of the judgment against a specified defendant. (Id. at 328 F.2d 749.) The reviewing court found that the notice of appeal limited the issues which could be considered on appeal, that the parties against whom the appellant sought to prosecute his appeal, but who were not named in the notice, had not entered appearances in the district court, and that the record failed to reveal that they had been notified of the appeal or had appeared or been represented in the appellate court. (Ibid.) Accordingly, the appellant was not permitted to appeal from the unspecified judgment.

In contrast to this well-reasoned

rule of law followed in several other federal circuits, the United States Court of Appeals for the Ninth Circuit has, in the instant matter, reviewed a summary judgment in favor of Chief Daryl Gates and Mayor Tom Bradley where the respondent failed to specify the summary judgment in his notice of appeal, the parties neither briefed nor argued the propriety of the summary judgment, and the designation of the record by both parties fails to include documents pertinent to the question of the propriety of the summary judgment. In this context, to rule, as the court below has done, that the summary judgment should be reversed because the record does not support the granting of such a

judgment is blatantly hypocritical. In essence, petitioners Gates and Bradley are being punished by a reversal of a summary judgment in their favor where the appellate process neither challenged nor questioned the propriety of the judgment and petitioners had no notice of the need to defend the judgment until the order of reversal issued. This Petition should therefore be granted in order to resolve the conflict created between the various circuits with regard to review by an appellate court of a judgment which can not be said, by any reasonable interpretation to have been included in a notice of appeal.

III.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A.

This case presents an extremely important question of federal procedure the impact of which will cost the federal court system enormous expenditures of time and judicial resources.

The Court of Appeals in this matter gave little or no consideration to an important aspect of this case which, so far as petitioner has been able to determine, is a matter of

first impression. The question of whether 42 U.S.C. section 1983 suits against municipalities may be bifurcated into "constitutional injury" and "Monell claim" components is one of critical importance to overburdened district courts and deserves far more attention than was afforded by the court below.

Civil rights litigation brought pursuant to 42 U.S.C. section 1983 undoubtedly occupies a significant portion of judicial time in federal district courts. Such suits, when brought against a public entity, involve lengthy, resource-consuming problems of proof to support the allegation that the municipality had a policy, custom or usage which caused

the injury. In the instant case, respondent was apparently prepared to introduce considerable evidence with regard to the practices and procedures of the Los Angeles Police Department in order to demonstrate a "pervasive custom of police misconduct." (C.D. 189: Plaintiff's Motion for Summary Judgment on Issue of Custom of Police Brutality, p. 6.) The statistical information upon which respondent intended to rely in proving official policy, together with possible incidents of specific misconduct (Ibid.), would have necessitated the expenditure of substantial judicial resources in the form of court time and time of involved court personnel. Petitioners, who litigate numerous

civil rights lawsuits, are aware of many similar trials which have taken weeks or months to complete because of the voluminous nature of such evidence.

Clearly, the trial court in this matter sought to promote judicial economy in the extended process of proving a Monell allegation by first trying the relatively simple question of whether or not the respondent had been deprived of any constitutional right. The advantages of such a solution are obvious. Instead of having his courtoom tied up for weeks on end over an issue which might never need to be tried, the trial court herein engaged in a brief five day trial which should have resolved the question of whether or not respondent

was entitled to recover anything. All of the parties functioned during the process as if the trial would resolve the issues between them, and respondent himself has admitted that if the jury determined that no constitutional deprivation occurred he would not be entitled to continue his suit against the municipal defendants. (Appellant's Opening Brief, pp. 5-6.) The Court of Appeals' opinion offers no logical rationale supporting its contention that the issue was not resolved at trial and relies instead on speculation and presumptions that do violence to accepted principles of law.

The Court of Appeals' holding in this matter implies that bifurcation

probably cannot be achieved because any testimony with regard to standard procedures or practices will serve to contaminate a jury and call their decision into question. Further, the ruling goes so far as to suggest that a plaintiff may still prosecute a lawsuit against a municipal entity on a Monell theory of liability even after no constitutional injury has been found, a ruling which blatantly challenges this Court's clear rule of law to the contrary. In light of the importance of the issues involved in this case in terms of judicial resources, and the increasing prevelance of such litigation, this Court should therefore grant the within Petition in order to settle the

important questions of law raised by the lawsuit and left unresolved (or improperly resolved) by the Court of Appeals' opinion.

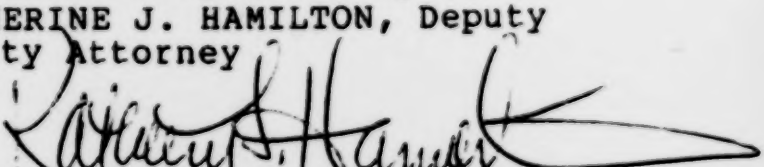
CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant a writ of certiorari and set aside the decision of the United States Court of Appeals for the Ninth Circuit.

DATED: September 20, 1985.

Respectfully submitted,

JAMES K. HAHN, City Attorney
JOHN T. NEVILLE, Senior Assistant City Attorney
KATHERINE J. HAMILTON, Deputy City Attorney

By 
KATHERINE J. HAMILTON
Deputy City Attorney

Attorneys for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD HELLER,

Plaintiff-Appellant

vs.

CRAIG BUSHEY, et al.,

Defendants-Appellants.

No. 82-6028
DC No. CV 80-2643-ER

Filed May 1, 1985
Clerk, U.S. Court of Appeals

Before: Sneed, Poole, and Ferguson, Circuit Judges

SNEED, Circuit Judge:

This is an appeal from judgments entered in a bifurcated trial brought under 42 U.S.C. §1983 (1982) for alleged constitutional deprivations suffered by the plaintiff, Ronald

Heller, during his arrest by defendant Los Angeles Police Officer Craig Bushey. Heller filed his action against the arresting police officers, various Los Angeles government officials, and the City of Los Angeles. The individual government officials were dismissed from the case and the Los Angeles Board of Police Commissioners and the Los Angeles Police Department were joined in their stead. The trial was divided so as to first try claims brought against police Officer Bushey and thereafter to try claims raised against the municipal defendants. The jury returned a general verdict for Officer Bushey. The district court then dismissed the action against the

municipal entities and entered judgment in their favor.

Heller does not challenge the verdict and consequent judgment in favor of Officer Bushey. He does appeal the district court's substitution of the Los Angeles Board of Police Commissioners and the Los Angeles Police Department for the individual defendants and the judgment dismissing his action against the municipal defendants.

We reverse the district court's dismissal of the individual defendants and the substitution of the Board of Police Commissioners and the Police Department in their stead. We also reverse the judgment dismissing claims against the municipal defendants and

remand the case for further proceedings.

I

FACTS AND PROCEEDINGS BELOW

On June 10, 1980, two Los Angeles Police Officers, Craig Bushey and Calvin Brasher, stopped Heller on suspicion of driving while intoxicated. The officers administered a series of field sobriety tests. Apparently dissatisfied with the results, the officers decided to take Heller to the station to undergo a breath test. When notified that he was under arrest, however, Heller became belligerent. One of the defendants, Officer Bushey, attempted to handcuff him. An altercation ensued. In the

course of the struggle, Heller fell through a plate glass window.

Heller brought an action based on 42 U.S.C. §1983 against both arresting police officers, Chief Daryl Gates of the Los Angeles Police Department, Los Angeles Mayor Tom Bradley, individual members of the Los Angeles Board of Police Commissioners, and the City of Los Angeles. In pretrial proceedings, Officer Brasher, Mayor Bradley, Chief Gates, and the individual members of the Board of Police Commissioners were dismissed from the action. The Los Angeles Board of Police Commissioners and the Los Angeles Police Department were substituted as defendants in place of the dismissed officials.

Without explanation appearing on

the record, the district court, as already indicated, bifurcated the trial with the intention of first trying the claims raised against police officer Bushey and thereafter proceeding, if necessary, to the disposition of claims brought against the City, Police Department, and Board of Police Commissioners. This bifurcation entailed no specific division of issues between the two phases of the proceedings.

Heller's claim against Officer Bushey rested on the assertion that Heller's Fourth and Fourteenth Amendment rights were violated by his arrest without reasonable cause and by the use of excessive force in effecting the arrest. As against the

municipal entities, Heller contended, as required by the rule in Monell v. Department of Social Services, 436 U.S. 658, 694 (1978), that they also were liable because Bushey acted in accordance with a police department policy or custom that condoned the use of excessive force by Los Angeles police officers.

After the trial against Bushey alone, the jury returned a general verdict against Heller and in favor of Bushey. Concluding that this verdict precluded Heller's theory of liability against the government entities, the district court did not allow Heller to present his case based on Monell. On its own motion, the district court dismissed Heller's claims against the

remaining defendants.

II

DISCUSSION

A. Dismissal of the Monell Claim

The district court's dismissal of the claims against the municipal defendants raises a question of law, which is reviewable de novo. See Guillory v. County of Orange, 731 F.2d 1379, 1381 (9th Cir. 1984.)

Appellees contend that the jury's verdict constituted a finding that Heller suffered no deprivation cognizable under section 1983. If Heller suffered no injury, they argue, neither the City nor its agencies are liable to him, without regard to the nature of their policies. Were these policies unassailable on

constitutional grounds, Heller, of course, would have no claim against the City or its agencies. Were they assailable on constitutional grounds, Heller, having suffered no injury, would lack standing to sue. No "case or controversy" within the meaning of Article III would exist. See generally 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 3531, 3531.4 (1984) (constitutional standing requires injury in fact).

Heller, while not challenging these principles, contends that the jury verdict does not constitute a finding that he suffered no injury to his constitutional rights. It follows, he continues, that there is a

"case or controversy" entitling him to challenge the policies of the City and its agencies. His position rests on the contention that the jury could have believed that Bushey, having followed Police Department regulations, was entitled in substance to a defense of good faith.[1/] Such a belief would not negate the existence of a constitutional injury.

We believe there is merit in Heller's position. To establish the liability of individual defendants under section 1983, a plaintiff must show, first, that he was deprived of an interest protected by the Constitution or laws of the United States and, second, that the defendants caused the deprivation

while acting under color of state law. 42 U.S.C. §1983 (1982); Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). There is no dispute that police Officer Bushey acted under color of state law when he was arrested Heller.[2/] The jury, in substance, was instructed that Heller was deprived of liberty without due process if he was arrested without reasonable cause. The jurors were further instructed that Heller's constitutional rights were violated if he was arrested with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. The jury's verdict for the defendant therefore embodies a finding that Heller was arrested for

reasonable cause and that the amount of force used was not unreasonable or excessive.[3/] The difficulty is that the conclusion that the force was reasonable could have been derived either from Police Department regulations, which incorporate a theory of "escalating force" or from a constitutional standard entirely independent of such regulations. We cannot say which with assurance.

The appellant insists that this uncertainty entitled him to proceed against the government entities in accordance with Monell v. Department of Social Services. So long as the jurors used the Police Department "escalating force" policy to establish the reasonableness of the force that

was used, the appellant's suit should not be dismissed in its entirety without a determination of the reasonableness of that policy. The transcript of the trial suggests that the jury could have used Department policy in that way. The Fourth Amendment requires that arrests be conducted in a reasonable manner. Tennessee v. Garner, 105 S.Ct. 1694, 1699 (1985).

During the trial, substantial testimony was presented demonstrating that Office Bushey followed the "escalating force" policy of the Police Department when arresting Heller. The transcript reveals that Officer Bushey used increasing amounts of force in an effort to restrain

Heller and attempted to apply a choke hold to Heller before Heller fell through the plate glass window. The transcript also indicates that Police Department regulations authorized use of the choke hold in such situations.

The jury was not instructed on its use of this testimony in its deliberations. Since the jury instructions defined permissible force as the force necessary to effect arrest in light of "all the surrounding circumstances," we believe the jurors could have considered Officer Bushey's compliance with the policy as either an indication of the reasonableness of Bushey's use of force for the existence of immunity based on good faith.

We must conclude that the general verdict does not foreclose a finding that Heller suffered a constitutional deprivation. Heller's Monell claim survived the general verdict. Dismissal of the City defendants was, therefore, improper. The jury verdict, of course, conclusively determined that there was probable cause to arrest Heller. On the other hand, it is equally clear that whether the application of force in accordance with Police Department regulations in this case exceeded constitutional limits has not been determined. Beyond this we are not prepared to express an opinion regarding the scope of any doctrine of issue preclusion.

B. Dismissal of the Individual Officials and Substitution of the Board of Police Commissioners and the Police Department

The district court granted the defendants' motion for summary judgment, dismissing from Heller's action Mayor Bradley, Police Chief Gates, and individual members of the Los Angeles Board of Police Commissioners. The Los Angeles Police Department and Board of Police Commissioners were then joined as defendants with the City of Los Angeles. On appeal, Heller challenges the propriety of the district court's dismissal and the substitution of defendants.

The dismissal of the individual

defendants by summary judgment is subject to de novo review on appeal. Allen v. A.H. Robins Co., 752 F.2d 1365, 1368 (9th Cir. 1985). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id.

Government officials may be held personally liable in actions under section 1983 for acts conducted in their official capacity, Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974), that authorize or approve unconstitutional conduct, Rizzo v. Goode, 423 U.S. 362, 371 (1976). To establish individual liability, the plaintiff must demonstrate an "affirmative link between the

occurrence of the various incidents of police misconduct and the adoption of any plan or policy . . . showing their authorization or approval of such misconduct." Rizzo, 423 U.S. at 371. However, government officials acting in their official capacity are protected by the good faith defense. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Scheuer, 416 U.S. at 247-48; Cinevision Corp. v. City of Burbank, 745 F.2d 560, 577-78 (9th Cir. 1984).

In his first amended complaint, Heller alleged that his constitutional injuries were caused by customs or policies to hire individuals with "vicious propensities" as Los Angeles police officers, and by other customs

or policies that authorized the challenged actions in his arrest.

In granting the individual defendants' motion for summary judgment, the trial court determined that only those individuals who were in office at the time of the trial were suitable defendants with regard to allegations of individual liability.[4/] The court also concluded that it would be proper to substitute the Los Angeles Board of Police Commissioners, as a policy-making body, and the Los Angeles Police Department for the individual municipal officials.[5/]

These conclusions were unjustified. The proper individual defendants in this action are those

officials who were in office before or at the time Heller was arrested and who may have adopted a plan or policy authorizing or approving the alleged unconstitutional conduct. See Rizzo, 423 U.S. at 371. We do not determine whether the individual defendants satisfy the requirements under Rizzo. That determination must be made by the district court. The record, at present, does not indicate which, if any, of the individuals named as defendants may meet this criteria. Thus, as to Heller's claim that he was injured as a result of the policies or customs authorized or approved by the named individual officials, it follows that the record does not disclose a proper basis for the dismissal of

those defendants on summary judgment.

Having dismissed the individual officials as defendants, the trial court permitted Heller to amend his complaint nunc pro tunc to stubstitute in their place the Los Angeles Board of Police Commissioners and the Los Angeles Police Department. Because we hold that the dismissal of the individual officials was improper, the need for the substitution no longer exists. Since the City of Los Angeles was already a defendant in this action, the joinder of its agencies, the Board and Police Department, was also unnecessary. We therefore reverse the addition of the Board and Police Department as parties to the present action.

III

CONCLUSION

The dismissal of all the individual officials on summary judgment and the substitution of the Board of Police Commissioners and Police Department was improper with regard to Heller's claims that his injuries were caused by a policy or custom promulgated by certain officials in their official capacities.

The dismissal of the Monell claims against the City of Los Angeles and the claims against all individual officials was in error. The jury verdict for Officer Bushey in the first proceeding does not require such a result. It does not preclude the claims against individual officials or

the Monell claims against the City.

We therefore reverse, and this action is remanded for further proceedings consistent with the opinion.

REVERSED AND REMANDED

FOOTNOTES

1/ All government officials enjoy a qualified, good faith immunity from liability under section 1983 if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); accord Harris v. City of Roseburg, 664 F.2d 1121, 1127-28 (9th Cir. 1981.) Good faith is an affirmative defense which the police officer must prove. Harris, 664 F.2d at 1129.

2/ See Jury Instructions, 7 Reporter's Transcript 813 ("[T]here is no dispute in this case that the defendant Craig Bushey was a police officer of the City of Los Angeles at the time of this incident in that he was acting under the color of the authority of the State of California . . . .").

3/ See id. at 816 ("[I]f you find . . . that the plaintiff has proved his claim that he was arrested without due process of law or that he was subjected to an excessive force in being placed under arrest, your verdict will be for the plaintiff and against the defendant.") Because the instructions required a verdict for Heller if either the due process or the excessive force claim was found,

the jury's verdict for the defendantrequired a negative finding on both claims.

4/ See 2 Reporter's Transcript 19-21.

5/ Id.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD HELLER,

Plaintiff-Appellant,

vs.

CRAIG BUSHEY, et al.,

Defendants-Appellees.

No. 82-6028
DC No. CV 80-2643-ER

Filed June 27, 1985
Clerk, U.S. Court of Appeals

Before: SNEED, POOLE, and FERGUSON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-531

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF LOS ANGELES, etc., et al.,

Petitioners,

v.

RONALD HELLER,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.
10880 Wilshire Boulevard
Suite 1900
Los Angeles, California 90024
(213) 475-4988

Attorneys pro bono publico
on behalf of the ACLU Foundation of Southern California
for Respondent Ronald Heller

QUESTIONS PRESENTED*

1. May a plaintiff in an action under 42 U.S.C. 1983, in which claims were made against both an individual police officer defendant and against a municipal entity and its supervisorial personnel under Monell v. New York City Department of Social Services, 436 U.S. 800 (1978), in which a bifurcated trial was ordered so that plaintiff's claims against the police officer defendant were tried first and then plaintiff's claims against the other defendants were to have been tried, and in which plaintiff

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* This Court has eschewed the practice by counsel of phrasing questions presented in a misleading manner, and hence respondent's counsel has rephrased the questions presented by petitioners. Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("[In instances in which t]he petitioner has phrased ... questions [in a misleading manner w]e decline to adopt th[e] formulation of issues .... Because of the misleading way the issues have been formulated, the parties have attached great significance to [matters which are not dispositive of the petition for certiorari].")

did not prevail in the first phase of the trial, then proceed to trial of his claims that the defendant police officer's alleged wrongful conduct represented implementation of an articulated governmental policy, if the jury in the first trial heard, as part of the case on excessive force against the police officer defendant, that the policy of the police department, under whose provisions the officer testified he acted, was unconstitutional on its face because it constituted a policy of use of excessive force?

2. Does the Supreme Court of the United States sit as a court of errors to correct perceived, but nonexistent, errors in a notice of appeal in a matter in which a notice of appeal clearly and unambiguously set forth the matter from which appeal was taken?

PARTIES BELOW

Respondent disagrees with that part of petitioners' statement of the parties below which states that "Tom Bradley and Daryl Gates were defendants in the trial court who were dismissed on motion for summary judgment ...." Petition at iii. Bradley and Gates were not dismissed on motion for summary judgment. As the trial court's docket sheet indicates, on September 21, 1981, "Act DISMISSED as to ... Gates, Bradley ...." Docket Sheet, page 11, entry No. 143, attached hereto as Appendix 1.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

INTRODUCTION

Respondent, Ronald Heller, an early 1960's All-American running back at USC, in June 1980 was on a visit from his home in Ketchum (Sun Valley) Idaho, to his parents in Los Angeles, California. Out in a car with two friends in the Venice area of Los Angeles, Heller was stopped by defendant Los Angeles police officer Craig Bushey. After field sobriety tests were administered, Bushey grabbed Heller in a carotid chokehold and threw Heller through a plate glass window into the store-converted-to-living-quarters of Latvian artist Valdemars Darznieks, who was awakened from a deep sleep with Heller and Bushey on top of him on his bed. This action followed. RT of trial October 19, 1982 to October 25, 1982; CR-1.

This action presents an unfortunate example of what happens in instances in which (1) the trial judge is sloppy, (2) a newly-sworn-in federal judge with no federal court

experience either in practice or on the bench decides to try an action two days after being sworn in, and (3) appellate counsel was not trial counsel, and does not have first-hand knowledge of what actually transpired pretrial and at trial, and is confronted and confounded by an almost unintelligible record which is the product of factors (1) and (2), immediately above.

None of the assumptions or arguments of petitioners is accurate and there is no legitimate reason for this Court to waste its time in an attempt to tidy up the unkempt house which lies in the wake of the trial in this action. The petition for certiorari therefore should be denied.

REASONS FOR NOT GRANTING CERTIORARI

1. THE COURT OF APPEALS DID NOT DECIDE A FEDERAL ISSUE IN A MANNER IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The decision below is not based on the premise that the jury did not follow its instructions.

Petitioners' contention that the decision below is based on the conclusion that the jury failed to follow its instructions is speculation not supported in the record, and therefore petitioners' contention that other circuits have decided that it is presumed that juries do follow instructions and hence the Ninth Circuit's decision in this case is in conflict with the law in other circuits is without merit.

Contrary to petitioners' interpretation of the jury instructions, it is clear that those instructions asked the jury to resolve every

issue presented to it only as to the defendant officer whose case the jury was hearing. No instruction asked the jury to decide a larger issue: Were plaintiff's rights violated? The instructions are clear, and the jury's finding, when taken in conjunction with the instructions, is equally clear: the jury found the defendant officer did not violate respondent's federal rights.

The court below did not improperly assume or assume at all, that the jury decided the case against the officer based on issues not before the jury. That the issue of qualified immunity, cf. Harlow v. Fitzgerald, 457 U.S. 800 (1982), was not presented to the jury in a jury instruction in no wise operates to support petitioner's unfounded contention that the jury did not consider the evidence presented that the officer (1) employed physical force pursuant to then-current police department escalating force policy, and (2) that that policy was

unconstitutional because it enshrined into policy permissible excessive force. The jury did not, as petitioners contend, decide the case on issues of law not presented to it: rather, the jury presumably based its decision on the evidence before it, and part of that evidence is the evidence set forth at (1) and (2), immediately above.

The court below did not, as petitioners argue, "impliedly" decide an important question of federal law with respect to whether or not it should be assumed that juries follow their instructions. Based on this fanciful theory of "implied" and imagined decision-making, petitioners then argue that it is important for this Court to grant certiorari to insure that federal courts in Section 1983 actions henceforth will not be stymied by not being able to bifurcate trials of Section 1983 actions. There is no support in the facts or procedural history of this case to warrant petitioners'

urging that this Court grant certiorari on this ground.

The problem petitioners believe was "impliedly" created easily could be cured by use of a special verdict form in a bifurcated Section 1983 action, and the intervention of this Court is not warranted to achieve that result for those parties in Section 1983 actions who perceive a problem as do petitioners.

B. The court's decision does not suggest that Monell-type actions may be maintained on a respondeat superior basis.

The only "basis" for petitioners' contention that the court's decision "suggests" that Monell-type Section 1983 actions may be based on a theory of respondeat superior is petitioners' suggestion.

The jury properly could have, and presumptively did, decide that the defendant officer acted within police department policy. There was no evidence that he did not act within policy; indeed, the officer and his sergeant testified the officer acted within policy, and plaintiff argued this to the jury. Thus, the jury could have, within both the parameters of its instructions and the evidence presented to it, decided that the officer did not violate respondent's federal rights because the officer was acting within police department policy--a successful Nuremburg defense (although it was illegal, contrary to popular belief, for the nazis to engage in the very conduct for which they claimed what came to be know as the Nurembrug defense). That is, although there was no formal jury instruction on qualified immunity, there was a submission of that concept to the jury.

APPENDIX 1

A-1

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PLAINTIFFS

RONALD HELLER

DEFENDANTS

CRAIG BUSHEY, CALVIN BRASHER, DARYL GATES, JAMES FISK, SAMUEL WILLIAMS, MARIANA PFAELZER, STEPHEN REINHARDT, SALVATORE MONTENEGRO, RIVA TOOLEY, STE[illegible] YSLAS, TOM BRADLEY, and THE [illegible]ELES,

CAUSE Cmplt for Damages

11/5/80 Fld 1st A/C

ATTORNEYS

Stephen Yagman
Suite 1900
10880 Wilshire Blvd.
Los Angeles, California 90024
213/475-4988

Fred Okrand
ACLU Foundition of Southern Ca
633 SOuth Shatto PLace
LA CA 90005
(213) 487-1720
&
Jack Greenberg
Steven L. Winter
NAACP

Stephen L. Murdock
Depty City Atty
1700 City Hall East
200 N. Main Street
Los Angeles, CA 90012
213/485-5941
[atty for Craig Bushey, Calvin Brash

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UNITED STATES DISTRICT COURT DOCKET

DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 80-2643
RONALD HELLER	CRAIG BUSHEY ET AL.	PAGE 10 OF ___ PAGES

DATE	NR.	PROCEEDINGS
9-22-81	mm	141. Fld respondent's oppo to motn for ord re Robert Johnson
9-23-81	mm	142. Fld ORD (TJH) deft Calvin Brasher's motn for S/J GRANTED; Deft Craig Bushey's motn for S/J GRANTED w/respect to: claims in cnts 1,3,4,5,7,8,& 9 of 1st A/C & claims in cnts 2,6 that arise under 42USC1985(3) & 1986. Deft Craig Bushey's motn for S/J is DENIED with respect to: claims in cnts 2 & 6 that arise under 42 USC 1983 & Claims in cnt 22. Deft Craig Bushey's motn for S/J is DENIED w/o prejd with respect to the State law tort claims in cnts 10, 11, 12, 13, 14, 15 & 18. This Crt retains pendent jurisd over those claims. Deft's Daryl Gates, James Fisk, Samuel Williams, Mariana Pfaelzer, Stephen Reinhardt, Salvatore Montenegro, Riva Tooley, Stephen Yslas, Tom Bradley & City of LA's motn for S/J is DENIED w/o prejd. This action is set for PTC 10-26-81 at 10 a.m.
*9-21-81	mm	143. MIN ORD: HRG re pltf's motn to hold Gate, Bradley, Williams & Fisk in crim contempt etc. DENIED. Defts' motn for S/J & to stay taking of depos contd to 10-5-81. Act DISMISSED as to Pfaelzer, Rhinehardt, Gates, Bradley, Williams & Fisk. Police Comm. to be substituted in as deft in place of individual comms.
9-30-81	mm	144. Fld deft's notc of taking depo of Ronald Heller on 10-7-81.
10-2-81	mm	145. Fld pltf's decl of Leo Salazar in connection w/attempts to duck servc of process by Police Chief Daryl Gates, City Atty Ira Reiner & Mayor Tom Bradley.
10-2-81	mm	146. Fld pltf's suppl memo of P&A in support of pltf's motn to compel prod of doc from defts.
10-7-81	mm	LODGED: Pltf's proposed Ord re contempt. NOT USED LODGED: Pltf's proposed ord re dism of specified defts. NOT USED LODGED: Pltf's proposed ord re compel prod of materials. NOT USED
10-6-81	mm	147. Fld deft City of LA's ORD(TJH) for S/J contd to 10-5-81 a.m.; defts Bradley, Gates, Pfaelzer, Reinhardt, Williams, Montenegro, Tooley, Yslas & Fisk's motn for S/J is GRANTED.
10-6-81		148. Fld ORD (TJH) Pltf's motn to adjudge defts Bradley, Williams, Fisk Gates & their attys Murdock & Reiner in contempt is DENIED.
10-15-81	mm	LODGED: deft's proposed ord to compel prod of docs. NOT USED.
*10-5-81	mm	149. MIN ORD: HRG: motns re contempt DENIED; motn for S/J to be renotc for fur discov; City to turn over all records re Hller, etc. for period of 6-79 thru 6-81 by 10-19-81.
10-21-81	mm	150. Fld pltf's memo of conts of fact & law. 151. Fld pltf's witn list. 152. Fld pltf's joint exh list.
*10-16-81	mm	153. Fld ORD (TJH) re production of specified docs listed herein.
10-19-81	mm	154. MIN ORD: HRG re pltf's motn to hold Robert Johnson in contempt & for sanct. No appr by pltf; cnsl states that pltf's cnsl informed him he was withdrawing motn; crt declines withdrawal of motn & DENIES motn.

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By analogy: if a police department had a K-9 corps and a policy that officers in the K-9 corps were to travel abroad with a dog in each K-9 unit with a window of the unit to be opened at all times, and a dog, pursuant to policy, but mistakenly (if dogs can make mistakes) rushed to the aid of a K-9 officer who, to the dog, appeared to need, but in fact, did not need assistance, and in that act mauled a civilian: could the officer be held liable for a use of excessive force under Section 1983?; if the officer were held not to liable, could the policymaker and the governmental entity be held liable on a Monell theory? The answer to the second part of this question clearly is "yes." This result has been reached consistently and uniformly by all circuit courts who have ruled on the issue.

In Garcia v. Salt Lake County, 768 F.2d 303, 310 (10th Cir. 1985), the most recent decision on this issue, the court held:

> Salt Lake County should be held liable for actions which are taken by its employees which are taken pursuant to a policy, custom or practice of Salt Lake County.
>
> Monell does not require that a jury find an individual defendant liable before it can find a local governmental body liable.

Cf. Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985). The ruling of the court below in this case is entirely consistent with the principles enunciated by this Court in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), and in harmony with all other circuits in this country who have ruled on this issue. (Interestingly, courts who bifurcate Section 1983 claims against police officers from 1983 claims against governmental entities and their supervisorial employees, routinely have held that in

instances in which 1983 plaintiffs prevail against the officers, they may not proceed on their Monell claims on the premise that such plaintiffs have already recovered from the officers all damages they legally may recover. See Sanchez v. City of Riverside, California, 596 F. Supp. 1983 [C.D. Cal. 1984]. This scenario, if taken in conjunction with the premise urged by petitioners--that a 1983 plaintiff who loses against the police officer may not then proceed to trial against government on the Monell claim--would operate to permit any federal judge to foreclose any Monell claim simply by an order of bifurcation. It does not seem that this result was intended by Monell which clearly stands for the proposition that claims brought pursuant to that case be legally possible to bring and try.)

The decision of the court below does not enlarge Monell, does not provide for Section 1983 liability against state governmental

entities based on respondeat superior, and simply furthers the principles enunciated by this Court in Monell.

Petitioners' contentions that "There is simply no way an arrestee could be subjected to excessive force and not suffer a deprivation of his constitutional right to due process[,]" Brief at 35, and "[liability may be imposed on a governmental entity] where a jury has conclusively found no injury[,]" id. at 36, are true but misleading. Here, the jury found that the respondent was not deprived of his rights by the officer. There is no finding, express or implied, in the verdict that respondent's rights were not violated: the only finding made by the jury, indeed the only finding which could have been made by the jury, is that this officer did not violate respondent's rights. Similarly, the jury did not find that there was no injury. That is all it found. Petitioners' speculation about what the court

of appeals decision "impliedly" means or "appears to permit," id. at 37, is at odds with petitioners' argument that courts of appeals must interpret jury verdicts in a rational manner.

2. THE DECISION IS NOT IN CONFLICT WITH DECISIONS BY OTHER CIRCUITS.

The fatal defect of petitioners' argument that the decision below is at odds with decisions by other circuits is that there is no factual predicate in the record for this contention. Simply put, the respondent's notice of appeal specifically set forth the appeal was taken from the September 21, 1981 dismissal of the claims against Bradley and Gates. CR-143. Therefore, the court below did not decide an issue on appeal which was not set forth in the notice of appeal. There is no factual predicate in the record for petitioners' contention, and there is no variance in the law among the circuits, on this issue, in this case.

Contrary to petitioners' ill-advised assertion that the court below is "hypocritical," Brief at 45, petitioners counsel is less than diligent for not reading and understanding the record and presenting it properly to this Court.

3. THE COURT BELOW DID NOT DECIDE AN IMPORTANT QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. This case does not present an extremely important question of federal law whose impact on the court system will cause the system to submerge.

As argued above, the court below simply implemented the Monell decision of this Court. By invocation of the much-used shibboleth that letting the decision of the court below stand will operate to sink the federal court system by enormous expenditures of time and resources,

petitioners shout fire in a crowded theater and hope to stampede this Court to grant the petition for certiorari. On this point, this Court should take notice of Milan Kudera's adage that "man's struggle against power is the struggle of memory against forgetting," "The Book of Laughter and Forgetting," and recall the occasions on which other counsel attempted to convince this Court from an argument to consequences that the Court should grant relief requested. As with petitioners' other arguments, this argument also is without a factual predicate.

First, although it may be an issue of first impression in this court whether Section 1983 actions may be bifurcated between claims against police officers and Monell claims, such an issue is a straw man. Surely, this Court does not sit to advise federal trial courts how they should handle their calendars or how they best can govern the order of presentation of

proof under Federal Rules of Evidence (West 1985) Rule 611. Of course, trial courts can bifurcate Section 1983 actions as was done in this case. And, since petitioner did not object to the bifurcation (respondent did), petitioner cannot now complain of the bifurcation order. Petitioner has not preserved this issue for appellate review.

Second, contrary to petitioners' unsupported assertion that Monell claims "involve lengthy, resource-consuming problems of proof to support the allegation that the municipality had a policy, custom or usage which caused the injury[,]'" Brief at 47-48, proof of policy claims takes less than an hour, as the record demonstrates in this case. RT-October 19, 1982, Professor Fyfe's testimony. Petitioners' unsupported speculation that respondent "was apparently prepared to introduce considerable evidence [on policy,]" id. at 48, is sheer speculation unsupported by the record and

belied by what actually transpired. Petitioners' statement that they are "aware of many similar trials which have taken weeks or months to complete because of the voluminous nature of such evidence[,]" id. at 49, is an improper argument on this petition. Which trials are referred to? In which court did they take place? Were counsel on both sides competent?

Invocation of the catch-phrase "it will submerge the federal courts," is unfounded, hysterical, and unwarranted.

There is no implication that bifurcation cannot be had if the decision of the court below stands. What petitioners want is to cut off all potential Monell claims by reasoning analogous to the second part of this Court's plurality decision in Parratt v. Taylor, 451 U.S. 527 (1981), to the effect that existence of a state tort remedy would operate to bar maintenance of a Section 1983 claim in federal

court. What they attempt to argue is that Monell claims should be permitted to be effectively foreclosed from litigation: in instances in which plaintiffs prevail on the underlying claim against an officer, plaintiffs could not proceed against the government, Sanchez, supra; and in instances in which plaintiffs did not prevail against the officer, then plaintiffs, by petitioners' argument, could not proceed against the government. Petitioners' reasoning would render this Court's holding in Monell an empty jar: governmental entities would be "persons" under Section 1983, but "persons" upon whom a federal judge could confer a de facto procedural immunity simply by bifurcating a trial.

In instances in which governments have policies and their officers act pursuant to those policies, governments properly may be held accountable for the actions of their officers which violate citizens' constitutional

rights notwithstanding that the officers may not have been held liable for those wrongful acts. Monell and Garcia, supra. This is all the court below held, and its holding does no injustice to any holding by this Court, nor does it create the vehicle by which all those who litigate Section 1983 actions with Monell components risk drowning and suffocation by the trial of Monell claims. Petitioners' argument to the contrary is hysterical and without merit.

4. CONCLUSION.

If this Court determines that it has the judicial resources to grant certiorari, it should do so, and thereby insure that the decision of the court below is understood and uniformly applied throughout the federal system.

STEPHEN YAGMAN, a member of
YAGMAN & YAGMAN, P.C.

Attorneys pro bono publico
on behalf of the ACLU
Foundation of Southern
California for Respondent
Ronald Heller

(3)

SUPREME COURT OF THE UNITED STATES

CITY OF LOS ANGELES ET AL. *v.* RONALD HELLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–531. Decided April 21, 1986

PER CURIAM.

Respondent Ronald Heller sued petitioners, city of Los Angeles, and individual members of the Los Angeles Police Commission, and two Los Angeles police officers in the United States District Court for the Central District of California under the provisions of 42 U. S. C. § 1983. He claimed damages by reason of having been arrested without probable cause and having been the victim of excessive force in the making of the arrest. The incident arose as a result of the two Los Angeles police officers stopping him because of a suspicion that he was driving while intoxicated. In the words of the Court of Appeals for the Ninth Circuit:

> "The officers administered a series of field sobriety tests. Apparently dissatisfied with the results, the officers decided to take Heller to the station to undergo a breath test. When notified that he was under arrest, however, Heller became belligerent. One of the defendants, Officer Bushey, attempted to handcuff him. An altercation ensued. In the course of the struggle, Heller fell through a plate glass window." *Heller* v. *Bushey*, 759 F. 2d 1371, 1372–1373 (1985).

The District Court held a bifurcated trial, and first heard respondent's claims against the individual police officer.* The jury was instructed that Heller would make out his constitutional claim if he were arrested without reasonable

*The second of the two police officers named as defendants was granted summary judgment by the District Court.

cause, or if he were arrested with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. *Id.*, at 1374. The jury was not instructed on any affirmative defenses that might have been asserted by the individual police officer. Tr. in No. 80–2643 (CD Cal.), pp. 803–822, 843. The jury returned a verdict for the defendant police officer and against respondent. The District Court then dismissed the action against the petitioners, concluding that if the police officer had been exonerated by the jury there could be no basis for assertion of liability against the city or the persons constituting its police commission.

Respondent appealed to the Court of Appeals for the Ninth Circuit, and that court reversed the judgment of the District Court dismissing respondent's case against the petitioners even though it did not disturb the verdict for the defendant police officer. Respondent urged, and the Court of Appeals apparently agreed "that the jury could have believed that Bushey, having followed Police Department regulations, was entitled in substance to a defense of good faith. Such a belief would not negate the existence of a constitutional injury" (footnote omitted). 759 F. 2d, at 1373–1374.

The difficulty with this position is that the jury was not charged on any affirmative defense such as good faith which might have been availed of by the individual police officer. Respondent contends in his brief in opposition to certiorari that even though no issue of qualified immunity was presented to the jury, the jury might nonetheless have considered evidence which would have supported a finding of such immunity. But the theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them, see *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U. S. ——, —— (1985), and that they do not consider and base their decisions on legal questions with respect to which they are not charged. We think that the Court of Appeals'

search for ambiguity in the verdict was unavailing; as that court itself noted later in its opinion, "[b]ecause the instructions required a verdict for [respondent] if *either* the due process *or* the excessive force claim was found, the jury's verdict for the defendant required a negative finding on both claims." 759 F. 2d, at 1374, n. 3. This negative, it seems to us, was not only conclusive as to Officer Bushey, but also as to the city and its police commission. They were sued only because they were thought legally responsible for Bushey's actions; if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable to respondent.

The Court of Appeals also stated:

> "We must conclude that the general verdict does not foreclose a finding that Heller suffered a constitutional deprivation. Heller's *Monell* claim survived the general verdict. . . . The jury verdict, of course, conclusively determined that there was probable cause to arrest Heller. On the other hand, it is equally clear that whether the application of force in accordance with Police Department regulations in this case exceeded constitutional limits has not been determined." *Id.*, at 1374–1375.

But this was an action for damages, and neither *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a defendant has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

CITY OF LOS ANGELES ET AL. *v.* RONALD HELLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–531. Decided April 21, 1986

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Cuyahoga Valley Railway Co.* v. *United Transportation Union*, —— U. S. ——, —— (1985) (MARSHALL, J., dissenting); *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting).

SUPREME COURT OF THE UNITED STATES

CITY OF LOS ANGELES ET AL. *v.* RONALD HELLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–531. Decided April 21, 1986

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Whenever the Court decides a case without the benefit of briefs or argument on the merits, there is a danger that it will issue an opinion without the careful deliberation and explication that the issues require. Today's *"per curiam"* opinion is a fair illustration of the problem. The two important issues presented in this case are not even identified in that document. The District Court's decision to dismiss the action against the city, the Police Department, and the Police Commissioners necessarily rested on two assumptions: (1) there was an inherent inconsistency between the jury verdict in favor of Officer Bushey and a possible verdict against the municipal defendants and (2) that inconsistency required the dismissal of the action against the municipal defendants. Far from specifically addressing those issues, however, the District Court dismissed the action against the city on the ground that it had "become moot."[1] In a similar vein, this Court rests its summary decision on the maxim that "juries act in accordance with the instructions given them." *Ante*, at 2. In my view, neither of the necessary assumptions for

[1] See 8 Record 844 ("With respect to the Monell cause of action, which was bifurcated from the initial trial, the Court is now convinced that has become moot by reason of the verdict in favor of the defendant and the Court is ordering dismissal of that cause of action at this time"); 2 *id.*, Doc. No. 209, dismissal order ("the plaintiff's theory of liability against the defendants, CITY OF LOS ANGELES, LOS ANGELES BOARD OF POLICE COMMISSIONERS and LOS ANGELES POLICE DEPARTMENT, based on the case of *Monell* v. *Department of Social Services of the City of New York*, 436 U. S. 658 . . . is moot").

the District Court's action—and for this Court's reinstatment of its decision—is remotely present in this case.

I

The first necessary assumption is that there would be an inevitable inconsistency between the jury verdict of no liability for Officer Bushey and a possible verdict of liability against the municipal entities; in the absence of such an inconsistency, the District Court's decision, and this Court's reinstatement of it, are simply inexplicable.

It is undisputed that Ronald Heller crashed through a plate glass window after some kind of an altercation with Officer Bushey. He had been stopped on suspicion of driving while intoxicated and given sobriety tests.[2] In his claim against the municipal entities, Heller contended that the city and the Police Department had adopted a policy of condoning excessive force in making arrests, that the policy was unlawful, and that he had been injured by the application of that policy at the time of his arrest. In his claim against Officer Bushey, Heller contended that his constitutional rights were violated because Officer Bushey had employed "unreasonable force" in arresting him.

On the day before trial, the District Judge bifurcated the trial into two phases—the first against Officer Bushey and the second against the municipal entities. The record contains no explanation for this decision, but it does reveal that Heller's counsel opposed bifurcation.[3]

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[2] After the altercation, Heller was given an alcohol level test, and was found to have one tenth the level of alcohol in his body necessary for a finding of driving while intoxicated under California law. 5 *id.*, at 134–136. Heller was never charged with driving while intoxicated. *Ibid.*

[3] See 5 *id.*, Doc. No. 203, minutes of chambers conference (Oct. 18, 1982) ("Court confers with Counsel re: Pretrial order, Jury trial on 10/19/82, Jury Instructions, Defendant's amended witness list and bifurcation of case. Plaintiff counsel opposes Bifurcation. Defendant does not oppose bifurcation").

In the proceeding against Officer Bushey, considerable evidence of the Los Angeles Police Department's policy and custom on the use of force was introduced. An expert witness testified regarding Los Angeles' officially sanctioned use of "escalating force," culminating in the use of the notorious "chokehold."[4] Officer Bushey himself testified that Heller's flight through the window resulted from his attempt to impose a chokehold, and that he was carefully following official Police Department policy.[5] Officer Bushey's superior, Sergeant Shrader, also testified that Officer Bushey's actions were in complete compliance with official Police Department policy.[6] Finally, Officer Bushey's attorney repeatedly emphasized that his client's actions were entirely consistent with established Department policy.[7]

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[4] See 5, *id.*, at 157–158 (testimony of James Fyfe) ("The Los Angeles Police Department employs a scale of escalation in the use of force. . . . [T]he Los Angeles Police Department varies from every other major police department I know of. The Los Angeles Police Department says that if that compliance hold fails to work the next degree of force to be used is a choke hold or, as the police department calls them, a carotid control hold and modified carotid hold and bar arm control holds"). Cf. *Los Angeles* v. *Lyons*, 461 U. S. 95, 97, n. 1 (1983) (describing chokehold); *id.*, at 114–119 (MARSHALL, J., dissenting) (reviewing Los Angeles Police Department's use of chokeholds and noting that 16 deaths had resulted from chokeholds since 1975). At the time of Heller's trial, *Lyons* was pending before this Court.

[5] 5 Record 99–100 ("As he began his two steps forward I applied—I put my left arm around his—the portion I tried to get was the front part of his throat. You use the blade of your wrist on the person's throat. As we are supposed to when we are trying to take someone into custody use verbal commands of first asking verbally and then demanding verbally. If that does not work we use what is called a pain compliance, which is trying to twist someone's wrist where the pain hurts them and they'll comply with your request. . . . I tried to get the blade of my wrist around to his throat to apply pressure to his throat, which is also a pain compliance hold").

[6] See 6 *id.*, at 279–281 (testimony of Sergeant Shrader) (describing Police Department's "accelerated force theory" and concluding that Officer Bushey's use of a chokehold would have been "within the policy").

[7] See, *e. g.*, 5 *id.*, at 170 ("[T]he carotid hold was a hold that was being

In submitting the claim against Officer Bushey to the jury, the trial judge gave an instruction that simply stated that whether or not the force used in making an arrest is unreasonable "is an issue to be determined in the light of all the surrounding circumstances."[8] After deliberating several hours, the jury returned a general verdict in favor of the officer.

Thus, despite the majority's summary assertion to the contrary, it is perfectly obvious that the general verdict rejecting the excessive force claim against Officer Bushey did not necessarily determine the constitutionality of the city's "escalating force" policy—a subject on which the jury had received no instructions at all. The verdict merely determined that the officer's action was not unreasonable "in the light of all the surrounding circumstances"—which, of course, included the evidence that Officer Bushey was merely obeying orders and following established Police Department policy.

As a result, there was no necessary inconsistency between the verdict for Officer Bushey and a possible verdict of liability against the municipal defendants. On that basis alone, the District Court plainly erred in dismissing as "moot" the

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taught to the Los Angeles Police Department"); 6 *id.*, at 279 (referring to "the accelerated force theory that the police department has"); *id.*, at 281 (referring to "the policy of what police department officers do"). See also Officer Bushey's counsel's closing argument, 7 *id.*, at 699 ("In this case it's not the City that's the defendant. It's Officer Bushey"); *id.*, at 706 (citing "testimony concerning our own policies and procedures as to the Los Angeles Police Department"); *ibid.* ("[T]he procedures which Officer Bushey followed are exactly what he's taught and the reasons he's taught to do it"); *id.*, at 716 ("It's Officer Bushey who's the defendant"); *id.*, at 718 ("Officer Bushey was trying to do his job").

[8] "Whether or not the force used in making an arrest, preventing an escape, or overcoming resistance was expressive [sic], unreasonable or violent is an issue to be determined in the light of all the surrounding circumstances." 8 *id.*, at 815–816.

suit against the municipal defendants, and the Court of Appeals was plainly correct to reverse the dismissal.[9]

II

In view of the fact that the Court of Appeals correctly concluded that there was no necessary inconsistency between a verdict exonerating Officer Bushey and a verdict holding the city and Police Department liable for the "escalating force" policy, it did not have to consider the appropriate response to a possible inconsistency in the context of a bifurcated trial.

Inconsistent verdicts are, of course, a familiar phenomenon. In a criminal case, a jury's apparently inconsistent verdict is allowed to stand.[10] In a civil case, the rule is less

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[9] The Court of Appeals concluded:

"The jury, in substance, was instructed that Heller was deprived of liberty without due process if he was arrested without reasonable cause. The jurors were further instructed that Heller's constitutional rights were violated if he was arrested with "unreasonable force" that exceeded the force necessary under the circumstances to effect arrest. The jury's verdict for the defendant therefore embodies a finding that Heller was arrested for reasonable cause *and* that the amount of force used was not unreasonable or excessive. The difficulty is that the conclusion that the force was reasonable could have been derived either from Police Department regulations, which incorporate a theory of 'escalating force,' or from a constitutional standard entirely independent of such regulations. We cannot say which with assurance." *Heller v. Bushey*, 759 F. 2d 1371, 1374 (CA9 1985) (footnote omitted).

[10] See *United States* v. *Powell*, 469 U. S. —— (1984) (reaffirming general rule that inconsistent verdicts can stand); *Harris* v. *Rivera*, 454 U. S. 339, 345 (1981) ("Inconsistency in a verdict is not a sufficient reason for setting it aside"); *Hoag* v. *New Jersey*, 356 U. S. 464, 472 (1958) ("jury verdicts are sometimes inconsistent or irrational"); *United States* v. *Dotterweich*, 320 U. S. 277, 279 (1943) ("Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries"); *United States* v. *Dunn*, 284 U. S. 390, 393 (1932) ("Consistency in the verdict is not necessary"). Cf. *Ulster County Court* v. *Allen*, 442 U. S. 140, 168 (1979) (BURGER, C. J., concurring) ("Courts have long held that in the practical

clear.[11] Nevertheless, in contrast to the Court's blithe assumption today, it is far from certain that the District Court's action—the dismissal—was an appropriate response, even if somehow a verdict against the municipal entities might have created an inconsistency. First, the Court ignores the fact that, in certain circumstances, a court retains the authority, even in a civil case, to allow an apparently inconsistent verdict to stand.[12] Second, the Court ignores the fact that, when faced with an apparently inconsistent verdict,

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business of deciding cases the factfinders, not unlike negotiators, are permitted the luxury of verdicts reached by compromise").

[11] See, *e. g.*, Bickel, Judge and Jury—Inconsistent Verdicts in the Federal Courts, 63 Harv. L. Rev. 649, 654 (1950) ("[T]here is not in a civil case the equivalent of a precedent such as *Dunn* [v. *United States*, *supra*] to overrule in upsetting inconsistent verdicts. The argument outlined against extending the *Dunn* rule to civil cases is thus quite a plausible one. But it is not unanswerable") (footnote omitted).

[12] Indeed, in explaining why an apparently inconsistent verdict in a civil case should not be disturbed, Justice Brandeis cited the leading case on the permissibility of inconsistent verdicts in a criminal context. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 485 (1933) (citing *Dunn* v. *United States*). See also F. James & G. Hazard, Civil Procedure 384 (3d ed. 1985) ("the refusal of a trial court to set aside a verdict obviously representing a compromise has frequently, and quite properly, been upheld"); *id.*, at 394 ("One of the great values of jury trial . . . is its ability to reflect the community sense of over-all fairness, and this may not in all cases coincide with the written law and the instructions which the court must give"); *Karcesky* v. *Laria*, 382 Pa. 227, 235 114 A. 2d 150, 154 (1955) ("Where the evidence of negligence, or contributory negligence, or both, is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict, and to sustain a verdict which is substantial"); *Jayne* v. *Mason & Dixon Lines, Inc.*, 124 F. 2d 317, 319 (CA2 1941) (L. Hand) ("We do not mean to imply however that we should have thought it fatal to the wife's recovery if no rational reconciliation of the verdicts was possible. *Dunn* v. *United States*, 284 U. S. 390"). Cf. Note, Inconsistent Verdicts in Civil Trials, 45 Harv. L. Rev. 1230, 1234 (1932) (observing that, in some jurisdictions, "a master can not complain solely because the servant was exonerated at the same trial. If the evidence is sufficient to support the verdict against the master, his appeal will be denied") (footnote omitted).

a court has a duty to attempt to read the verdict in a manner that will resolve inconsistencies.[13] Third, the Court ignores the fact that, upon receiving an apparently inconsistent verdict, the trial judge has the responsibility, not to retain half of the verdict, but to resubmit the question to the jury.[14] Finally, the Court ignores the fact that, if verdicts are genuinely inconsistent and if the evidence might support either of the "inconsistent" verdicts, the appropriate remedy is ordinarily, not simply to accept one verdict and dismiss the other, but to order an entirely new trial.[15]

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[13] See *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108, 119 (1963) (in considering jury answers to questions in a special verdict, "it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them . . . We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, . . . before we are free to disregard the jury's special verdict and remand the case for a new trial"); *Atlantic & Gulf Stevedores Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355, 364 (1962) ("Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way"); *Affolder* v. *New York, Chicago & St. Louis R. Co.*, 339 U. S. 96 (1950); *Fairmount Glass Works*, 287 U. S., at 485 (Brandeis, J.) ("Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct"); *Union Pacific R.* v. *Hadley*, 246 U. S. 330, 334 (1918) (Holmes, J.) ("[S]ince the [jury] finding was possible on the evidence it cannot be attributed to disregard of duty. . . . Beyond the question of attributing misconduct to the jury we are not concerned to inquire whether its reasons were right or wrong").

[14] See, *e. g.*, *Dickerson* v. *Pritchard*, 706 F. 2d 256, 259 (CA7 1983) ("[T]he trial court properly resubmitted the inconsistent verdicts to the jury for reconsideration"); *University Computing Co.* v. *Lykes-Youngstown Corp.*, 504 F. 2d 518, 547 (CA5 1974) ("[I]f the jury returns two inconsistent verdicts, the trial court may resubmit the issue to them for clarification"); *Hopkins* v. *Coen*, 431 F. 2d 1055, 1059 (CA6 1970) (upon receipt of inconsistent verdicts, trial court could have sent jury "back to the jury room to further deliberate with appropriate instructions to bring back consistent verdicts"); *Alston* v. *West*, 340 F. 2d 856, 858 (CA7 1965) (when jury returned an inconsistent verdict, "the court properly exercised its discretion in resubmitting the case to the jury").

[15] See, *e. g.*, *Malley-Duff & Associates* v. *Crown Life Ins. Co.*, 734 F. 2d

Although the Court fails to address it, the question this case raises (if, in fact, the initial view of inevitable inconsistency is accepted) is whether a different set of principles should apply in a bifurcated trial—more narrowly, in a trial that was bifurcated over the objection of the plaintiff. Because the question has not been argued, I do not foreclose the possibility that bifurcation should make a difference, but it is not immediately apparent to me why it should. In this case, the same jury would have passed on the municipal entities' liability, and would have relied on the evidence adduced in the first phase of the trial as well as that presented in the second phase. At the very least, it is unclear to me why the normal devices for addressing an apparently inconsistent verdict—construing the verdict in a manner that resolves the inconsistency; resubmitting the case to the jury for *it* to resolve the inconsistency; or even ordering a new trial—should be unavailable in a bifurcated context.

If the Court's unprecedented, ill-considered, and far-reaching decision happens to be correct, defendants as a class have been presented with a tactical weapon of great value. By persuading trial judges to bifurcate trials in which both the principal and its agents are named as defendants, and to require the jury to bring in its verdict on the individual claim first, they may obtain the benefit of whatever intangible factors have prompted juries to bring in a multitude of inconsistent verdicts in past years; defendants will no longer have

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133, 145 (CA3) ("We conclude that the answers to Questions 1, 2(A), and 2(B) may be considered inconsistent . . . We will vacate the $900,000 verdict in the state law claims and order a new trial") cert. denied, 469 U. S. —— (1984); *Global Van Lines Inc.*, v. *Nebeker*, 541 F. 2d 865, 868 (CA10 1976) (citing "the rule which says that inconsistencies which show jury confusion serve to mandate a new trial"); *Wood* v. *Holiday Inns, Inc.*, 508 F. 2d 167, 175 (CA5 1975) ("Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required"). Cf. Fed. Rule Civ. Proc. 49(b) (appropriate remedy for inconsistent special verdicts and general verdict is resubmission to the jury, or a new trial).

to abide the mechanisms that courts have used to mitigate and resolve apparent inconsistencies.[16] Perhaps that is an appropriate response to the current widespread concern about the potential liabilities of our municipalities, but I doubt it. *Cf. Oklahoma City* v. *Tuttle*, 471 U. S. ——, —— (1985) (slip op. 10–12) (STEVENS, J., dissenting).

III

The Court today reverses an interlocutory decision in a consitutional rights case on the basis of assumptions that dramatically conflict with the record and with settled legal principles. The Court mistakenly assumes that there was a necessary inconsistency between the verdict of no liability against the individual officer and a possible verdict against the municipal defendants; it then mistakenly assumes that dismissal was an appropriate response to the perceived inconsistency. Perhaps not coincidentally, the Court achieves these results without the aid of briefs or argument, and relies on an anonymous author to explain what it has done.

I respectfully dissent.

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[16] Cf. *Alston* v. *West*, *supra*, n. 14 (in negligence suit against flower shop and driver for automobile accident, jury initially returned verdict of liability for flower shop and no liability for driver; after case was resubmitted, jury returned liability verdicts against both employer and driver).